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U.S. Environmental Protection Agency
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1200 Pennsylvania Avenue, NW (MC 2137)
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Dear Ms. Huffer:

The National Governors' Association (NGA) Center for Best Practices recently held two meetings on Collecting Environmental Data in the 21st Century. The meetings involved officials from thirty-one states, including managers and staff from media program and information technology offices, as well as several attorneys. There was substantial discussion at the meetings on two new US EPA initiatives: the Cross-Media Electronic Reporting and Recordkeeping Rule (CROMERRR) and the Central Data Exchange (CDX).

State representatives at the meetings were generally supportive of EPA's approach to the new electronic reporting rule. They liked the emphasis on performance standards in CROMERRR, rather than a more prescriptive list of acceptable technologies that may become obsolete very quickly. They also thought it was a good idea to have a split between the basic standards in the rule and specific technologies in guidance (in the form of the CDX design document.) It is important to keep the rule itself as technology-neutral as possible, given the rapid rate of change in information technology. With two years to go until the rule would take effect, it is highly likely that any technologies specified in the rule now would be on their way out by the time it is implemented. States also raised several specific issues they would like to see addressed by EPA.

EPA should work closely with states to define the relevant business needs for electronic reporting and ensure that those needs drive the rule criteria. States have extensive experience with electronic reporting, and are much further along in the process of designing and implementing these systems than EPA. This experience has shown them that a comprehensive analysis of the business needs of an electronic reporting program is essential to its success. Many of the participants at the meetings felt that EPA has not yet adequately conducted such an analysis, and questioned whether the rulemaking and CDX efforts could succeed without it. Several participants questioned the need for a rule at all and wondered why EPA was moving forward on a strict two-year timeframe. These are questions that a well-thought-out business needs analysis would go a long way towards answering. In its One-Stop grant program, EPA requires states to prepare a business needs analysis prior to awarding any funds—perhaps EPA

Reservations about legal and security issues should not hinder the implementation of electronic reporting. One thing that should definitely not be allowed to drive the rule requirements is disagreements between program and legal staff on what is necessary to produce credible data through electronic reporting. It is important that both EPA and states make the effort to educate the legal community about what is and isn't possible to achieve through electronic authentication. One hundred percent certainty about identity is not possible through technology, yet it does not exist in the paper world either. It is the specific business processes used by a state that have the greatest effect on the viability of its electronic authentication system, not the choice of a specific technology. It will take time for electronic signatures to become as familiar to the public as written signatures; until that time their use will always involve some level of risk. However, state experience has shown that this risk can be mitigated effectively through careful planning and early involvement from their legal staff.

The rule should support the simplest possible system that provides credible and enforceable data. The rule needs to keep the burden it imposes on states and the regulated community to a minimum. The more complex the system is, the more difficult and expensive it will be to implement. This is especially true if the system must include peripheral hardware (such as smart card readers or biometric devices), which can be very hard to implement across the wide range of computer systems used by the regulated community. Risk analysis should be an important part of determining what level of security a given reporting requirement needs—and in general, the risks of electronic reporting are very low and the benefits are very high.

A good measure of the burden imposed by an electronic reporting system is to compare it to the paper system it is designed to replace. Most of the benefits of electronic reporting accrue to the regulatory agency; the main selling point to the regulated community is that it makes compliance easier. Many states are worried that these EPA efforts will result in more burden on their reporters, making them reluctant to participate and negating the benefits states hope to gain. In some ways, such as its emphasis on establishing the intent of the submitter, the rule asks much more of regulatory agencies than a paper system. This could create significant problems for any electronic reporting project.

A good certification process will be key to the success of the rule. EPA presented three potential options for certifying state electronic reporting systems at the meetings:

- self certification, which relies on a statement from states that their system complies with the rule;
- program-by-program certification, which would certify through a program modification for each delegated reporting program; and
- a hybrid approach that would allow EPA to certify a reporting system for use in all programs a state specifies in a single process.

Many states would prefer a self-certification system to the other two options. States collect the vast majority of environmental data, and their commitment to ensuring this data is collected in a credible and enforceable manner is strong. States regularly involve their agency legal staff and attorney general offices in the development of these systems; in some cases state law requires approval by the attorney general. Adding an additional approval process after the state has determined its system is sufficient is not seen as an efficient use of state resources.

Although the self-certification process would be the easiest to implement, states understand that it may not be enough for some delegated programs with strict legal and security requirements. The hybrid approach would be an acceptable way to certify such programs, and should have the following characteristics.

- It should be a set process, with criteria for approval and disapproval clearly described in the rule.
- It should be applied consistently to all delegated programs, with as little variation in procedure between regions as possible.

OEI. This will allow the determinations to be made by those with the greatest understanding of the technical issues involved and promote consistency nationwide.

- States should have the opportunity to certify a system across multiple media programs and reporting requirements during a single certification process, provided those reporting programs have similar legal and security requirements.
- States should be allowed to have more than one system certified so they may provide multiple options to the regulated community. They should also be able to establish more than one security level, so that programs with lower levels of risk could use simpler systems than those with higher levels of risk.

One suggestion for the hybrid approach raised at the Cleveland meeting was for states to submit a document to EPA describing how their system meets the criteria described in the rule, which would form the basis of EPA's review.

States would also like to be directly involved in the certification of electronic reporting programs. One way to accomplish this would be to establish a board to review program certifications, and provide for state representation on that board. This would allow EPA to take advantage of the expertise that exists in this area among state officials, and assure states that the certification process is fair, uniform, and takes their perspective into account.

States should be able to use their own electronic signature laws to support their programs. Until federal legislation is available authorizing electronic signatures, no purely electronic system will be sufficient to alleviate concerns about using electronic signatures in federal courts. States that have authorizing legislation in place should not be required to implement overly complex systems to compensate for a lack of federal action in this area.

Several state participants at the meetings expressed concerns about the rule's emphasis on preserving federal enforceability. These officials do not believe that federal enforceability is a necessary element of current delegation agreements, and question whether the rulemaking effort is an attempt to impose this requirement after the fact. Although federal enforceability is a broader policy issue that will need to be addressed by states, EPA, and DOJ in a separate forum, EPA should be aware that the imposition of stricter standards than imposed by state law through CROMERRR is a significant issue for many states.

States that are already conducting electronic reporting successfully should not be required to do major retooling to comply with the rule. Given the two-year current timeframe for implementation of the rule, it is clear that states will have a number of electronic reporting programs in place at that time with an established history of collecting credible and enforceable data. This history should be a significant consideration when these programs are certified. States will have already spent considerable resources in designing and implementing these systems, including a major investment in educating and training the regulated community in their use. EPA should commit to keep changes to such systems to a minimum during the certification process, or the burden should shift to EPA to show why existing systems cannot meet the criteria established in the rule.

NGA has currently formed an ad-hoc workgroup comprised of eight state officials who attended the meetings and an EPA representative to work through the question of how certification might affect current state electronic reporting systems. The group will put together a few mock systems for EPA to analyze against the draft rule criteria, based on systems either in operation or planned for implementation in the next year. We believe this effort will contribute greatly to clarifying the rule criteria and their application to states.

The rule should not implicitly make public key infrastructure (PKI) systems the only viable signature option. As the rule was presented at the NGA meetings, it seemed that PKI was the only system EPA would see as sufficient to meet the criteria. However, there are a number of unresolved issues with PKI that make it a far from perfect solution, and not all states

by the rule. The performance standards in the rule need to be truly technology-neutral so states have the flexibility to use both old and new technology as they deem appropriate.

Both the rule and the central data exchange should be designed to allow for new ways for states and EPA to interact. New developments in information technology are appearing daily, many with the potential to radically redefine the relationship between states and EPA. One such development is active data retrieval, which would involve states maintaining data on their own servers and providing access to EPA, rather than sending data in. Saving pointers to data where it was originally collected is a much more efficient use of resources than maintaining duplicate copies of databases, and makes it much easier to ensure access to the most up-to-date and accurate version of the data. EPA should ensure that the rule is flexible enough to account for such developments so that the need for future rulemaking efforts can be minimized.

In closing, I would like to thank you for the steps you have taken to include states in the CROMERRR and CDX efforts and your willingness to integrate state perspectives into them. We have developed a strong and productive relationship through our work over the past few years, which is an important part of the work NGA does on behalf of the Governors of the fifty-five states and territories. I look forward to continuing this relationship in the future.

Sincerely,

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cc: State Electronic Reporting Contacts
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